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Issue Date: 21 July 2003

CASE NO.: 2001-LHC-01383

OWCP NO.: 01-145379

In the Matter of

DONALD A. CYR

Claimant

v.

ELECTRIC BOAT CORPORATION

Employer

DECISION AND ORDER
(UPON REMAND BY THE BENEFITS REVIEW BOARD)

This proceeding involves a claim for benefits filed by Claimant on November 10, 1998 under the Longshore and Harbor Workers' Compensation Act, as amended, 33 U.S.C. § 901 *et seq.* (herein the Act or the Longshore Act), and the regulations promulgated thereunder. Claimant contends that he has a causally related permanent partial disability to both hands or arms under § 8(c)(1) or § 8(c)(3) of the Act due to symptoms and impairments of hand/arm vibration syndrome. (CX 1)¹ Specifically, Claimant alleges that he has a 50 percent loss of use of the right arm and a 15 percent loss of use of the left arm caused by vibration syndrome. (T 11, 15)

On March 8, 2002, I issued a Decision and Order (2002 D&O) in which I denied the claim based on the finding that the claim violated the two-year statute of limitations in § 13(b)(2) for filing a claim for compensation for "occupational disease." The final paragraph of my D&O states:

I find that Claimant became aware of the permanent disability of both of his hands caused by hand/arm vibration syndrome well before the statute of limitations cut-off date of November 10, 1996, and most likely in 1993 or 1994, as he initially testified. As Claimant testified

¹The following references are used herein: "CX" denotes Claimant's Exhibit; "EX" denotes Employer's Exhibit; "T" denotes the transcript of the hearing on October 3, 2001.

that he believed that this condition was probably due to his use of the air-fed chisel, I find that at the same time he also knew that the disability was causally related to his job with Employer and his use of air-fed vibratory tools there. (Moreover, Claimant also testified that he believed that these symptoms were “related to the first injury.”) Consequently, the claim for compensation is barred by the statute of limitations in § 13(b)(2) of the Act, and must be denied.

(2002 D&O at 9)

Claimant appealed to the Benefits Review Board (the Board) which issued a Decision and Order on March 20, 2003 (BRB No. 02-0447) (Board D&O) in which it affirmed, as uncontested, my determination that the two-year statute of limitations is applicable because hand/arm vibration syndrome is an occupational disease, but vacated my determinations that the claim violated the statute of limitations. The Board remanded the case for further consideration.

First, the Board noted that at the hearing Employer's counsel explicitly stated that he was not contesting the timeliness of the claim for compensation based on injury to Claimant's left upper extremity, but rather contested the left arm disability on the basis that any injury to that body part is not causally related to his employment. (Board D&O at 2, n.1) Thus, Employer has waived a statute of limitations violation defense to the alleged disability involving Claimant's left arm.

Second, with respect to my statute of limitations violation finding regarding the claim for compensation for injury to the right upper extremity, the Board held that I had failed to address the question, as required by Bath Iron Works Corp. v. Galen, 605 F.2d 583 (1st Cir. 1979), of whether Claimant was “aware that his work-related injury will decrease his earning capacity.” The Board also stated:

Unlike “awareness” for purposes of the traumatic injury provisions [of the Act], the time period for occupational diseases explicitly states [sic] that it does not commence until the employee is aware of a disability and its relationship to his work and his disease, which necessarily requires that he be disabled before he can be found to be “aware.”

(Board D&O at 3) Further, the Board held that I had failed to address “the essential question under the applicable regulation, 20 C.F.R. § 702.212(b) ... of when claimant became aware that his disability was related to his disease, i.e. hand/arm vibration syndrome, and to his employment,” pursuant to § 13(b)(2). The Board also cited several cases in which employees who had pain or other symptoms caused by a work-related injury but continued to perform their work duties were held not to be aware of a disability “until their employment-related diseases or injuries caused them to miss time from work.” In this regard, the Board stated:

In the present case, the administrative law judge did not determine when claimant's hand-arm vibration syndrome resulted in an inability to perform his work. Moreover, as claimant seeks benefits under the schedule, [in § 8(c)(1) or § 8(c)(3)], the date he became aware of a permanent impairment must also be determined....Claimant's continued employment after first experiencing symptoms consistent with his subsequently diagnosed hand/arm vibration syndrome is evidence which the administrative law judge must consider....

(Board D&O at 5)

I. THE ISSUES

Based on the Board's decision, the first issue for me to decide is whether the claim alleging disability involving Claimant's upper right extremity is barred by the § 13(b)(2) two-year statute of limitations. In doing so, I must determine whether, prior to November 10, 1996 (i.e., two years before he filed the claim under the Act) Claimant knew that he suffered an impairment that was permanently disabling and also weigh the effect of Claimant's continued employment after he first experienced symptoms.

The second issue — which pertains to the allegations of disability involving both the right and left upper extremities — is whether Claimant's 1996 settlement of his compensation claims filed under the Rhode Island Workers' Compensation Act (the State Act) encompasses and bars the instant Longshore Act claim filed two years later. Employer raised this issue in its brief submitted to me on January 8, 2002, as well as in its post-remand brief filed on July 6, 2003. (2002 Brief, pp. 5-7; 2003 Brief, pp. 4-7)

Finally, should the instant claim survive scrutiny under the first two issues, the next questions are whether the injuries to Claimant's extremities are causally related to his employment with Employer and, if so, what is the nature and extent of Claimant's disabilities, if any.

II. FINDINGS OF FACT AND CONCLUSIONS OF LAW

The Claim Relating to the Upper Right Extremity is Not Barred by the Statute of Limitations

As noted above, in the 2002 D&O I found that Claimant became aware of the permanent disability of both of his hands caused by hand/arm vibration syndrome well before the statute of limitations cut-off date of November 10, 1996, and most likely in 1993 or 1994, and that at the same time he also knew that the disability was causally related to his job with Employer and his use of air-fed vibratory tools there. (2002 D&O at 3-9) However, this defense is inapplicable to the left arm claim because Employer did not raise the statute of limitations defense vis-a`-vis that body part.

Further, I now must determine whether Claimant sustained a permanent disability of his right arm and, if so, when he became aware of it.

In the 2002 D&O I stated that the record contains no evidence that Claimant was informed by a physician that he had a disability due to hand/arm vibration syndrome more than two years before he filed the claim. Therefore, I reviewed Claimant's own testimony in the search for his pre-November 10, 1996 "awareness." Claimant testified that he was employed by Employer beginning in 1980 as an insulation mechanic. (T 21, 27) In that job he installed sound-proofing rubber and fiberglass insulation material on component parts of ships. In performing this work Claimant used air-fed grinders, air chisels or chippers, and burr tools. (T 23-25) Claimant's right wrist was originally injured on December 15, 1987. Claimant underwent two surgical procedures on his right wrist in 1987 or 1988. At the end of 1995 Claimant re-injured his right wrist when the grinder he was using "kicked back" causing his wrist to "jam" again. Claimant testified that he lost no time from work after re-injuring the right wrist, but that he subsequently began performing a "light duty job." It appears that his light duty consisted of merely "tank watching." Claimant performed the light duty job for at least the last six or eight months before he was permanently laid off on June 1, 1996. (T 22, 33, 34) The 2002 D&O contains an in-depth analysis of Claimant's testimony at the hearing based on which I discredited his contention that he was not aware he had continuing injury to his hands due to hand/arm vibration syndrome. (2002 D&O at 6-8) Although I also found that Claimant had pre-November 10, 1996 awareness of his permanent disability, on reconsideration the most I am able to conclude from this testimony is that prior to November 10, 1996 Claimant was aware that he had a permanent injury to his hands: Claimant stated that beginning in 1992 he noticed that his hands began to become numb and fall asleep and were always cold. (2002 D&O at 8-9) Claimant's statements, by themselves, do not establish he was aware, pre-November 10, 1996, that he had a permanent disability to the right hand; i.e., Claimant's testimony fails to establish that prior to November 10, 1996 he knew the problems he experienced with his right hand resulted in a permanent loss of earning capacity.

However, Employer argues that there is other evidence that prior to November 10, 1996, Claimant not only knew that he had a permanent injury to his right hand, but that he also was aware that he had a permanent disability that diminished his wage-earning capacity. (2003 Brief, pp. 2-4) Employer points out that in a treatment note dated May 2, 1990, Dr. Leonard Hubbard stated that Claimant "appears to have reached a medical end result and at this time he may be considered to have 20% disability of the right upper extremity as the result of loss of motion from his injury and required treatment." (EX 30) On the other hand, it is not clear whether this disability was due to hand/arm vibration syndrome or to a prior traumatic injury to the right upper extremity. As set forth in the 2002 D&O, Claimant testified that in December 1987 he suffered what appears to have been a traumatic injury, and Claimant stated that it was in 1993 or 1994 that he started having numbness in both hands and that he believed this probably was caused by his using the vibrating chisel at work. (2002 D&O at 6) Consequently, Dr. Hubbard's statement does not assist in establishing that in May 1990 Claimant had any disability that was caused by hand/arm vibration syndrome.

Employer also relies on the February 26, 1996 report by Dr. Edward Akelman of his examination of Claimant on that date. In this report Dr. Akelman noted that Dr. Hubbard had reported a recurrence of right hand numbness in 1992 and 1993 that Dr. Hubbard diagnosed as caused by ulnar nerve entrapment. Dr. Akelman also reported that Claimant “is now back on a light duty job doing odds and ends.” Dr. Akelman opined that Claimant's right upper extremity injury “was at a point of maximum medical improvement,” that he should not lift more than 40 pounds nor do repetitive wrist flexion and extension work, and that Claimant “is currently partially disabled from selected work.” In conclusion, Dr. Akelman stated that Claimant has a “15% partial permanent impairment of his affected right upper extremity.” (EX 29) Finally, Employer relies on the report dated September 2, 1996 from the Dr. John E. Donley Rehabilitation Center (Donley Center), where Claimant was sent for evaluation, physical therapy and vocational rehabilitation in connection with his claim under the State Act. The Donley Center report states that Claimant had reached maximum medical improvement with respect to his right upper extremity impairment or injury – described as decreased wrist movement, decreased upper arm strength, and with regard to the fourth and fifth digits, decreased temperature, anesthesia or numbness, and “parasthesias” – and he would only be able to “assume modified duty position.” The report also notes that Claimant was working in a “light duty capacity until he was laid off.” (EX 17)

Based on Dr. Akelman's report, I find it is clear that at least as early as February 26, 1996, Claimant had a permanent disability – i.e., a permanent loss of wage-earning capacity – due to the hand/arm vibration injury to his right upper extremity. The fact that Claimant continued to work for Employer until he was laid off in June 1996 does not rebut this finding because, as Claimant himself concedes, his last six or eight months of employment was in light duty that required no physical exertion. However, this finding does not establish, in and of itself, that Claimant was aware of his permanent disability to the right upper extremity more than two years before he filed the claim under the Act on November 10, 1998.

Employer argues that Dr. Hubbard's report resulted in Claimant receiving 63 weeks of compensation based on a 20% permanent loss of use of the upper right extremity in 1990. (EX 12) However, that was about three years before Claimant began to suffer from hand/arm vibration injury, according to his testimony. Finally, the record contains no evidence that Claimant had knowledge of the above-noted reports by Dr. Hubbard, Dr. Akelman or the Donley Center on or before November 10, 1996. Consequently, I cannot find that these reports establish Claimant's “awareness” prior to that date.

In conclusion, I find the record establishes that Claimant was aware he had a permanent impairment of the right upper extremity due to hand/arm vibration syndrome beginning about 1993. Further, I find Claimant had a permanent partial disability of the right arm under § 8(c)(1) of the Act due to hand/arm vibration syndrome commencing on February 26, 1996 (the date of Dr. Akelman's examination). Finally, however, I find there is insufficient evidence to establish that Claimant was aware more than two years before he filed the claim on November 10, 1998 that this permanent right arm impairment caused a loss of wage-earning capacity and resulted in disability under the Act.

Consequently, the claim for disability related to the upper right extremity is not barred by the two-year statute of limitations in § 13(b)(2).

Compensation for Disability Due to Hand/Arm Vibration Syndrome
of the Right and Left Upper Extremities is Barred by Claimant's
Settlement of the State Action

Employer contends that Claimant's 1996 settlement of his compensation claims filed under the State Act encompasses and bars the claim filed on November 10, 1998, under the Longshore Act. (2002 Brief, pp. 5-7; 2003 Brief, pp. 4-7)

Employer paid Claimant compensation under both the Longshore Act and State Act for the December 15, 1987 traumatic injury to the right wrist and subsequent disfigurement due to surgery. Compensation for those injuries was resolved under a consent decree entered by the State on July 11, 1991. (EX 7 - 15) Thereafter, Claimant filed a State Act claim for compensation for a left shoulder injury occurring on January 17, 1995, and Employer paid Claimant compensation for that injury. (EX 16, 17)

In 1996 the parties revisited and settled the State claims for the December 15, 1987 and January 17, 1995 injuries. Pursuant to the settlement, Employer agreed to pay Claimant \$87,620.00, and on August 13, 1996, Claimant signed a "General Release," stating, *inter alia*:

That I, Donald Cyr, in consideration of the sum of \$87,620.00, which shall apply to all unknown and unanticipated injuries and consequences as well as those now disclosed ... do hereby remise, release and forever quitclaim unto said [Employer] ... any and all demands of whatever nature, past, present or future ... under the [State Act], including those for compensation and medical and hospital expenses ... arising out of all injuries and consequences thereof....

(EX 18) It should be noted that at the time Claimant signed this release he was no longer employed by Employer, as he had been permanently laid off on June 1, 1996.

In connection with this settlement, Claimant was evaluated at the Donley Center which, on September 20, 1996, issued a report regarding the right wrist and shoulder injuries, and noting that Claimant "is interested in settling his case at this time..." This report was addressed to the State workers' compensation judge who was handling the matter. (EX 17) On September 24, 1996, the State judge conducted a formal hearing regarding the settlement. At that time Claimant's then counsel advised the court, "There are no pending cases...and no unpaid medical bills." Upon being questioned by his then attorney, Claimant testified that he had originally injured his right upper extremity in 1987, and he knew that the weekly compensation payments and medical coverage would cease if the court approved the parties' settlement. Counsel's statements at the hearing clarified that the \$87,620.00

settlement consisted of a lump sum of \$74,477.00 to Claimant for the injuries and \$13,143.00 to his attorney as a fee. Finally, the court asked Claimant, "You know this ends the case against [Employer] forever?" Claimant responded: "Yes." (EX 19) On September 24, 1996, the State judge issued an "Order" approving the settlement and providing, *inter alia*, the following "findings of fact":

3. That any other new, separate, different specific or permanent injuries, including any loss of use or disfigurement and any physical or psychological effects resulting from the afore-said injuries of or [sic] any other injury sustained while [Claimant] was employed by the Respondent are expressly included in this settlement.

The judge's concluding "order" in that document states, *inter alia*:

2. That the future payments due under the Workers' Compensation Act be and they hereby are commuted to the lump sum of \$87,620.00, representing payments due for his remaining life expectancy of 1809.6 weeks, and said Respondent ... is hereby ordered to pay forthwith to said [Claimant] said sum in full settlement under the said Workers' Compensation Act.

(EX 20) On October 17, 1996, the State court entered a "Final Decree" in which it was noted that Employer had paid Claimant the sum of \$87,620.00 and all medical bills for which it was liable, and that Claimant "has executed a release." (EX 21) This ruling also "ORDERED, ADJUDGED AND DECREED"

That Respondent is hereby discharged from all liability under the Workers' Compensation Act by reason of every and all injuries, known or unknown which were or may have been sustained on 12/15/87 and 1/17/95 or any other date during the course of [Claimant's] employment with Respondent and for or by reason of any condition resulting from the aforesaid injuries.

Employer argues that the decision of the First Circuit Court of Appeals in Bath Iron Works v. Director, OWCP [Acord], 125 F.3d 18 (1st Cir. 1997), requires that I find the State agency's approval of Claimant's August 13, 1996 release bars him from recovering for any disability alleged in the November 10, 1998 claim. I agree. The instant case arises within the jurisdiction of the First Circuit as the alleged injuries occurred in the State of Rhode Island. In Acord the Court held that a federal administrative law judge in considering the Longshore Act claim in that case should have given collateral estoppel effect to the determination of the Maine workers' compensation commissioner that the incident in which the employee stubbed his toe and jammed his knee did not permanently contribute to his alleged knee impairment. The Circuit Court stated:

[T]he Supreme Court has instructed that “federal courts must give the [state] agency's fact finding the same preclusive effect to which it would be entitled in the State's courts.” University of Tennessee v. Elliott, 478 U.S. 788, 799 (1986).

125 F.3d at 21. Acord noted that in Elliott the Supreme Court based this holding on the “full faith and credit” clause of the Constitution and that the principle applies to federal agencies as well as federal courts. Id. The only exceptions are where the state's burdens of proof or substantive standards are different. Id. But Acord noted that “this is so only where the difference undermines the rationale of the doctrine.” Id. at 22. Indeed, in the instant case the State agency did not make any findings other than to accept and enforce the settlement to which Claimant had agreed of his own volition. Thus, any differences between the Longshore Act's and the State Act's burdens of proof and substantive standards are irrelevant here. It appears that the Board is of the same mind. See Formosa v. Tracor Marine, Inc., 29 BRBS 105, 107 (1995), holding that “factual findings of a state court or administrative tribunal are entitled to collateral estoppel effect in other state or federal administrative tribunals...[but] collateral estoppel bars only relitigation of a particular legal or factual issue that was necessarily litigated and actually decided in a previous suit (citations omitted).”²

In the instant matter, the State workers' compensation judge ruled on September 24, 1996 that the parties' settlement “expressly included” and fully resolved not only the specific claims of employment-related disability that Claimant had filed with the State, but also “any other new, separate, [or] different ...injuries....or any other injury sustained while [Claimant] was employed by” Employer. (EX 20) After Employer paid Claimant the agreed upon \$87,620, the State court's Final Decree “Ordered, Adjudged and Decreed” that Employer was “discharged from all liability” for “all injuries, known or unknown which were or may have been sustained [on specific dates]...or any other date during the course of [Claimant's] employment with Respondent....” (EX 21) It is difficult to conceive of a judgment that could more broadly indemnify Employer from liability for disability arising out of Claimant's employment with it. And I find that this State judgment covers the claim under the Longshore Act for alleged disability of Claimant's right and left upper extremities due to hand/arm vibration syndrome.

Finally, although collateral estoppel and full faith and credit do not depend on the correctness, propriety or fairness of the earlier judgment (and Claimant could have appealed the State

²Formosa stated that the “full faith and credit” doctrine was not applicable in that case because it “does not apply to judicial findings but to judgments.” Id. at 107, n.3. However, in the instant case the State agency's rulings are embodied in its judge's September 24, 1996 Order approving the settlement and the Final Decree issued on October 17, 1996, after Employer paid the agreed \$87,620. I am unable to find a distinction between a “judgment” and these two rulings by the State judge. Thus, I conclude that “full faith and credit,” as well as collateral estoppel, is applicable here.

determination if he believed it was wrong),³ it is quite clear that the State judgment was, and is, correct. Claimant knowingly and willingly surrendered his right to compensation for any and all disability arising out of his employment with Employer. This is borne out by the language of the release Claimant signed on August 13, 1996, and his and his attorney's responses at the State hearing on September 24, 1996. Nor can it be argued that during the period in which Claimant entered the settlement and it was vetted by the State judge Claimant was ignorant of his hand/arm vibration impairments. As set forth above, Claimant was aware at least as early as 1993 that he had a permanent impairment of the right upper extremity due to hand/arm vibration syndrome. The same evidence, reviewed in detail in the 2002 D&O, establishes that Claimant was aware at least as early as 1993 that he also had a permanent impairment of the left upper extremity due to hand/arm vibration syndrome. Further, by the time he executed the release in August 1996 about 10 months had passed since Claimant last performed work involving serious exertion. Certainly at that time Claimant's causally related impairments would have been manifest and known to him. Thus, I find that Claimant accepted the settlement with full knowledge of the impairments involving his upper extremities.

Based on the foregoing, I find that the November 10, 1998 claim under the Act for disability due to injury to Claimant's right and left upper extremities caused by hand/arm vibration syndrome – or by any other injury or condition involving those body parts – is barred by collateral estoppel and the full faith and credit clause of the Constitution.

Causation and Nature and Extent of Claimant's Alleged Disabilities

In light of the above, there is no need to make determinations regarding these additional issues.

Claimant's Counsel is Not Entitled to An Attorney's Fee

In my 2002 D&O I ruled that Claimant's counsel was not entitled to an attorney's fee under § 28 of the Act. In the Board's D&O it stated:

On appeal, claimant also argues that the administrative law judge erred in failing to award an attorney's fee for services performed before him; claimant avers, in this regard that his counsel was successful in obtaining payment of medical expenses on behalf of claimant.

Board D&O at 6. The Board therefore directed that I “consider the issue of claimant's entitlement to an attorney's fee premised on his attorney's success in obtaining medical benefits....” Id.

³ “[T]he point of collateral estoppel is that the first determination is binding not because it is right but because it is first – and was reached after a full and fair opportunity between the parties to litigate the issue.” Acord, 125 F.3d at 22.

Upon reconsideration, I again find that Claimant's counsel is not entitled to a fee. First, Claimant's counsel has not achieved a successful prosecution of the claim because compensation has been denied herein.

Second, as the Board noted, in my 2002 D&O I found, based on the parties' stipulation, that Employer had voluntarily paid medical benefits pursuant to § 7 of the Act. Board D&O at 6, n.9. Claimant's attorney, however, in his brief to the Board (filed on May 1, 2002) in support of the appeal and arguing for his entitlement to a fee, stated that on June 20 and September 18, 2000 Employer made payments to Dr. S. Pearce Browning for bills totaling \$397.00. (Claimant's Brief, pp. 9-10) Employer, on the other hand, filed a brief on July 7, 2003 in which it argues that Claimant's counsel is not entitled to a fee because there is no evidence that it refused to pay any medical bill related to the alleged injuries. Employer agrees that it paid Dr. Browning's bills for examining Claimant, but points out that Claimant has not referred to action by his counsel that caused Employer to pay these bills over its refusal, delay, or objection. Claimant's attorney has now had ample time to refute these contentions in Employer's brief of July 7, 2003, but, to date, has failed to do so. Indeed, the record contains no argument or evidence showing that Employer ever refused to pay these or any other pertinent medical bills. Further, the record shows that the first charge by Dr. Browning was for services provided on April 25, 2000 and the second charge was for the physician's services on July 13, 2000. (CX 2H) As the record does not show when the bills were sent to Employer for payment and Employer paid them only two months after the services were rendered, there is no reason to conclude that Employer was resistant or recalcitrant in handling these bills. Based on the above, I find that Claimant has failed to establish that his attorney's efforts resulted in Employer paying any pertinent medical bills.

In sum, Claimant's attorney has not achieved a successful prosecution of the claim and is not entitled to a fee pursuant to § 28 of the Act.

ORDER

The claim for compensation of Donald A. Cyr is denied. Claimant's counsel is not entitled to an attorney's fee.

A

Robert D. Kaplan
Administrative Law Judge

Cherry Hill, New Jersey